IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26/03/2004

CORAM

THE HON'BLE MRS. JUSTICE R.BANUMATHI

CRL.APPEAL No.96 of 1998

Abdul Raheem ... Appellant /
Complainant

-Vs-

U.P.K.Mohammed Haneefa ... Respondent/
Accused.

This Criminal Appeal arises out of the judgment dated 28.11.1997 made in C.C.No.610 of 1996 on the file of Judicial Magistrate, Manapparai.

!For appellant : Mr. A.N.Rajan

^For respondent : No appearance.

:J U D G M E N T

This appeal arises out of order of acquittal in C.C.No.610 of 1996 acquitting the Respondent / Accused under Sec.138 Negotiable Instruments Act. By the Judgment dated 28.11.1997, learned Judicial Magistrate, Manapparai acquitted the accused for the offence under Sec.138 Negotiable Instruments Act.

2. Relevant facts necessitated for this appeal could briefly be stated thus:- Case of Complainant is that the accused borrowed a hand loan of Rs.60,000/- from the Complainant. In discharge of the said amount, on 28.02.1996, accused issued Ex.P.1 - Cheque bearing No.69017 6 for Rs.60,000/- drawn on his account with City Union Bank at Manapparai. On 20.06.1996, the Complainant has presented the said cheque for collection through his Banker - Indian Overseas Bank at Puthanatham and the same was returned (Ex.P.2 - Memo) with endorsement "Fund Insufficient". On 03.07.1996, the Complainant issued Ex.P.4 - Notice to the accused calling upon him to pay the amount of Rs.60,000/-. On 15.07.1996, accused sent Ex.P.6 - reply notice repudiating the claim and containing false allegations. Hence, the complaint was filed under Sec.138 Negotiable Instruments Act.

3. Before the trial Court, Complainant examined himself as P.W.1. P.W.2 (Sankaranarayanan) - Officer of Banker of the accused viz., Manapparai City Union Bank was examined. P.W.2 deposed that there was no

sufficiency of funds in the account of the accused and that there was only Rs.3,195.50 in his account when the cheque presented for collection and that the cheque was returned with endorsement " Insufficiency of Funds " .

4. To repudiate the claim of the Complainant, accused examined himself as D.W.1. In his elaborate statement, accused had set forth various defence viz.,

(i) that there was partition dispute between the accused and his brother Umar Kathaf (who has married Complainant's daughter) on the enjoyment of Cloth Shop ($t[spf;fil), which is in the occupation of the accused, regarding which a suit is filed in O.S. No.124 of 1995 on the file District Munsif's Court, Manapparai; and in that suit, the accused had filed I.A.No.277 of 95 for interim injunction;

(ii) on 22.09.1995 - 12.00 noon, the accused and his two sons were man-handled by the Complainant and six others and were taken to Sub Registrar's Office at Manapparai, where they were forced and coerced to put signatures in the papers held out by the Complainant and six others. The Complainant and others have snatched away six blank cheques containing the signatures of the accused;

(iii) on 10.12.1995, the Complainant and others illegally trespassed into the Cloth Shop of the accused and had stolen away the materials and cash, regarding which a criminal case is also registered in Crime No.175 of 1996.

Apart from the accused (D.W.1), D.W.2 (Rajakaveri Maniyam) - Document Writer was also examined to bring home the point that he had written Ex.D.6 - Partition Deed (dated 22.09.1995).

5. Upon consideration of the evidence and materials and contentions of the accused, the learned Magistrate raised doubts whether the Complainant would have advanced a sum of Rs.60,000/- when the parties are entangled in the civil litigation. The learned Magistrate also pointed out the possibility that the brother of the accused viz. Umar Kathaf having taken away the bunch of cheques and those cheques are being utilised to make a claim against the accused. In this regard, the learned Magistrate has also pointed out the claim made by Umar Kathaf, brother of the accused on two other cheques starting with number " 690... ". Expressing doubts whether there is legally enforceable debt, the trial Court dismissed the complaint acquitting the accused.

6. Aggrieved by the acquittal of the accused, the Complainant has preferred this appeal. Contending that the genuineness of Ex.P.1 - Cheque cannot be disputed by the accused, the learned counsel for Appellant / Complainant submitted that the trial Court erred in attaching much importance to the plea of litigations / disputes set forth by the accused. It is further submitted that the plea adopted by the Respondent / Accused that the cheques

were taken away in September, 199 5 was not earlier pleaded. It is the further contention that if really the cheques were so stolen, the Respondent / Accused could have very well instructed his banker to stop payment. It is further contended that in the absence of any definite evidence that the Cloth Shop was looted and the cheques were stolen, the trial Court erred in finding that one of the removed cheques is utilised by the Appellant / Complainant in making the claim against the accused.

7. Though served, Respondent / Accused did not enter appearance in this appeal. Though the Respondent / Accused has not entered appearance, the contention set forth by him before the trial Court is taken into consideration while considering the contentious points urged by the Appellant / Accused.

8. Upon careful reassessment of the evidence and materials on record, Judgment of the trial Court and submissions of Appellant / Complainant, the following points arise for consideration in this appeal:-

(i) Whether the Appellant / Complainant has proved the legally enforceable debt ? and whether the presumption raised under Sec.139 Negotiable Instruments Act is rebutted on the facts and circumstances of the case ?

(ii) In the light of various disputes between the Appellant / Complainant and the Respondent / Accused and pendency of Civil and Criminal cases, whether advancement of hand loan in February, 1996 is acceptable ?

(iii) Whether the contention of the defence that in September, 1995 several cheques were stolen from the Respondent / Accused and that those cheques are utilised by the Appellant / Complainant and brother of the Accused is probablised by the facts and evidence ?

(iv) Whether the order of acquittal suffers from serious and substantial error warranting interference ?

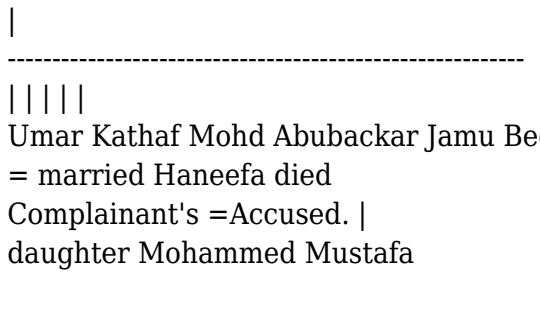
9. To attract the penal provisions under Section 138 of Negotiable Instruments Act, a cheque must have been drawn by the accused on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge in whole or in part, of any debt or other liability due. That means, the cheque must have been issued in discharge of a debt or other liability wholly or in part. Thus it must be shown that the cheque was issued for the purpose of discharge of any subsisting debt or other liability.

10. In the complaint, the nature of debt is not clearly averred. It is only stated that the Respondent / Accused borrowed a hand loan of Rs.60,000/- from the Appellant / Complainant and issued Ex.P.1 - Cheque for Rs.60,000/-. The Appellant / Complainant has not stated the date of alleged hand loan either in the complaint or in his testimony. Subsistence of debt is not proved either by documents or by examination of other witnesses. It is thus clear that the claim of the Appellant / Complainant under Ex.P.1 - Cheque

is unsupported by any other material. Finding of the trial Court that the Complainant has not proved the "Subsisting Debt" cannot be said to be suffering from substantial error.

11. Of course, under Sec.139 of Negotiable Instruments Act, there is a presumption that unless the contrary is proved, that the holder of the cheque received the cheque for the discharge in whole or in part of any debt or other liability. But the presumption under Sec.139 Negotiable Instruments Act is rebuttable on the facts and circumstances of the case or independent evidence. As found by the trial Court, the presumption raised under Sec.139 Negotiable Instruments Act is convincingly rebutted by the Respondent / Accused by the overwhelming facts and circumstances.

12. For appreciating the merits of the contentious points raised by the Respondent / Accused before the trial Court on the improbability of the hand loan being advanced to him in February, 1996, we may briefly refer to the number of disputes / litigations in which the parties are entangled. Genealogy of the accused and his brothers is as under:-



Brother of the Respondent / Accused, viz. Umar Kathaf had married Complainant's daughter.

13. O.S.No.124/95 and I.A.No.277/95. The Respondent / Accused is in occupation of the Shop in Door No.17/31, Puthanatham, where he is said to be running a Cloth Shop. On the enjoyment of this Cloth Shop, there is dispute between the Respondent / Accused and his brother Umar Kathaf and his sisters and brother's son. Regarding the said dispute, Respondent / Accused has filed a Civil Suit in O.S.No.124 of 1995 on the file of District Munsif's Court, Manapparai. The said suit is filed against (i) U.P.K.UmarKathaf, (ii) Mohammed Mustafa, (iii) Rahamathulla, (iv) Sheik Abdullah, (v) Shafiullah and (vi) Joffer. In the said suit, Respondent / Accused had also filed I.A.No.277 of 199 5 and obtained temporary injunction on 02.02.1996. On 29.02.1996, he had filed another application in I.A.No.170 of 1996 to issue direction to the Deputy Superintendent of Police, Manapparai for implementation of the order of temporary injunction granted in I.A.No.277 of 19 95. When the Respondent / Accused and his brother Umar Kathaf were so

seriously entangled in a civil suit, it is highly doubtful whether the Complainant (who is the rk;ge;jp of the said Umar Kathaf) would have advanced hand loan of Rs.60,000/- to the accused on 28.02.1996.

14. When there were difference between the parties, it is alleged that the Respondent / Accused and his sons were taken to the Sub Registrar's Office at Manapparai and that they were coerced and forced to put signatures in the papers held out by the Appellant / Complainant and his party. It is further alleged that at that time, Complainant and six others had snatched away six blank cheques containing the signature of the accused and hence, those six cheques snatched away by the Complainant and others are not supported by any consideration.

15.Criminal case in Cr.No.175/95 of Puthnatham P.S. On 10.02.1995 , the Complainant and six others illegally trespassed into the Cloth Shop of the accused and removed all the materials and cash. Regarding this occurrence, accused had lodged a complaint before Puthanatham Police against the seven persons including Umar Kathaf and the case was registered in Crime No.175 of 1995 under Ss.147, 148, 379 and 323 I.P.C. (Ex.D.2.)

16. The contention of the Respondent / Accused that the Complainant and his men had snatched away six signed cheques from him is probablised by yet another fact and circumstance. It is to be noted that the number of Ex.P.1 - Cheque is '690176'. Cheque No.'690179' is said to have been issued by the Respondent / Accused in favour of Umar Kathaf for Rs.50,000/-. The said Umar Kathaf is said to have presented the cheque bearing No.690179 to his banker - Indian Overseas Bank. The cheque was bounced. Claiming the amount on the cheque bearing No.690179, the said Umar Kathaf had issued Ex.D.3 - Notice (dated 11.04 .1996) to the accused. Likewise, alleging borrowal of Rs.10,000/- and issuance of cheque bearing No.'690180' and dishonour of the same, the said Umar Kathaf had also issued Ex.D.4 - Notice (dated 08.04.1996) to the accused claiming the amount. It is to be noted that the numbers of all the above cheques and the present Ex.P.1 - Cheque start with "690...". The starting of all the cheques with numbers "690..." is a strong circumstance probablising the defence that the Complainant party and the said Umar Kathaf might have taken away bunch of cheques as contended by the accused. These Interse differences between the parties are to be settled only in the civil suit. Suffice it to point out that the several disputes between the Complainant party and the accused throw serious doubts on the claim of the Complainant.

16. On behalf of the Complainant it is contended that if really the Complainant party had carried away the cheques and Respondent / Accused had not issued Ex.P.1 - cheque, the accused could have instructed his Banker - City Union Bank, Manapparai to stop payment. This argument is farfetched one. The Respondent / Accused might not have expected that the complainant and Umar Kathaf would present the cheque for collection. That apart, the differences between the parties seem to have deepened only after filing of the civil suit and obtaining interim order of injunction in I.A.No.277 of 1995 and seeking direction to the Police for implementation of that order. This defence is clearly set forth in Ex.D.5 - Reply Notice. In his statement before the trial Court, the accused / D.W.1 has also clearly spoken about the various disputes between him and his brother Umar Kathaf and the Complainant. In the light of facts and evidence, the contention of the accused that bunch of signed cheque leaves were forcibly taken away and that one such cheque is utilised by the Complainant cannot be brushed aside.

17. Conduct of P.W.1 / Complainant during the cross-examination is also to be pointed out. The Complainant being rk;ge;jp of Umar Kathaf must be in the know of things. But during cross-examination, when P.W.1 / Complainant was questioned about the disputes and the civil case, he feigned ignorance which is suggestive that he is not a truthful witness. Taking note of that conduct of P.W.1, the learned Magistrate was right in raising doubts on the credentials of P.W.1 and his claim of advancing hand loan in February, 1996.

18. On the facts and circumstances of the case, the trial Court is justified in raising the doubts on the advancement of the hand loan and whether there is any "legally enforceable debt". It is to be borne in mind that in an appeal against the acquittal, the High Court would be slow to interfere with the order of acquittal. Unless the High Court is satisfied that the reasonings for acquittal are palpably wrong and unsustainable, the High Court would not interfere with the order of acquittal. The reasonings of the trial Court for acquitting the accused is well in conformity with the evidence and materials on record. This Court finds no reason to reverse the order of acquittal. This appeal has no merits and is bound to fail.

19. For the reasons stated above, this appeal is dismissed.

Index:Yes
Internet:Yes

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To
1. The Judicial Magistrate,
Manapparai.

2. The Chief Judicial Magistrate,
Trichy.

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